

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

CURTIS L. BYRD, JR.,

Plaintiff,

vs.

No.3:05cv000180 SWW

DR. E. KINIESH, W. TIDWELL,
JIMI JIMINEZ, WARDEN COLE JETER,
LINDA TOLIVER, and FEDERAL
BUREAU OF PRISONS,

Defendants.

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ORDER

The plaintiff in this action, Curtis L. Byrd, Jr., a former inmate at the Federal Correctional Institute in Forrest City, Arkansas, seeks damages for alleged deliberate indifference to his medical condition (high blood pressure), including being forced to work on landscaping detail. The matter is before the Court on motion of the United States, on behalf of the defendants, to dismiss or, in the alternative, for summary judgment [doc.#20] on grounds that service has not been perfected upon the United States Attorney General and the United States Attorney for the Eastern District of Arkansas within 120 days as required by Fed.R.Civ.P. 4(i)(2)(A). Plaintiff has responded in opposition to defendants' motion [doc.#22], asserting that defendants are in default pursuant to Fed.R.Civ.P. 12(a)(3)(A)(B) and that a default judgment should accordingly be entered. Defendants have filed a reply to plaintiff's response, again reiterating that service has not been perfected. Having considered the matter, the Court denies the government's motion to dismiss or for summary judgment and denies plaintiff's motion for a default judgment.

Plaintiff filed this action *pro se* and was granted leave to proceed *in forma pauperis* (“IFP”) by Order dated July 28, 2005 [doc.#4]. In that Order, this Court ordered the U.S. Marshal for the Eastern District of Arkansas to serve the summons and complaint on defendant(s) pursuant to the provisions of Fed.R.Civ.P. 4, *see id.*, and summons was issued as to each defendant and sent to the U.S. Marshal for service. This Court also ordered that the matter be referred to a Magistrate Judge for appointment of counsel to plaintiff.

On August 10-11, 2005 [doc.#’s 7-11, 13], the U.S. Marshal returned summons as to each defendant indicating that service had been accomplished. Meanwhile, on September 21, 2005 [doc.#17], the Magistrate Judge issued an Order appointing counsel for plaintiff. On January 13, 2006, defendants filed the motion to dismiss or for summary judgment now before the Court arguing that service was not perfected on the United States Attorney General and the United States Attorney.

As the above chronology demonstrates, this Court granted plaintiff IFP status and directed on plaintiff’s behalf that each defendant was served in accordance with Fed.R.Civ.P. 4. It was only after summons was returned indicating service on defendants that plaintiff was appointed counsel. In this respect, plaintiff certainly could have been misled by this Court’s Order directing service and the U.S. Marshal’s return of summons indicating service on defendants. Likewise, to the extent service was not proper as to some or all defendants, the government can be excused for not filing an answer or other responsive pleading. Accordingly, as plaintiff is now represented by counsel, the Court will deny plaintiff’s motion for a default judgment and will extend the time for properly serving all defendants that haven’t been properly served and will also extend the time in which to file an answer or other responsive pleading. In

this respect, the Court directs that plaintiff, within thirty (30) days of the date of entry of this Order, properly serve all defendants in accordance with the Federal Rules of Civil Procedure to the extent they haven't been already. The time for filing an answer or other responsive pleading as to any or all defendants will be extended sixty (60) days from the date of service upon any or all defendants pursuant to today's Order.

IT IS THEREFORE ORDERED that the motion of the United States to dismiss or, in the alternative, for summary judgment [doc.#20] be and it hereby is denied.

IT IS FURTHER ORDERED that the motion of plaintiff for a default judgment [doc.#22] be and it hereby is denied.

IT IS FURTHER ORDERED that plaintiff, pursuant to the Federal Rules of Civil Procedure, perfect service on all defendants to the extent they haven't been already within thirty (30) days of the date of entry of this Order.

IT IS FURTHER ORDERED that the time for filing an answer or other responsive pleading as to any or all defendants be extended sixty (60) days from the date of service upon any or all defendants pursuant to today's Order.

Dated this 2nd day of February, 2006.

/s/Susan Webber Wright
UNITED STATES DISTRICT JUDGE